

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FIRST CITY BANK; TENNESSEE BANKERS ASSOCIATION,
Plaintiffs-Appellants,

v.

NATIONAL CREDIT UNION ADMINISTRATION,
Defendant-Appellee,

AEDC FEDERAL CREDIT UNION; TENNESSEE CREDIT UNION
LEAGUE; CREDIT UNION NATIONAL ASSOCIATION, INC.

Intervening-Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE MIDDLE DISTRICT OF TENNESSEE

BRIEF FOR THE NATIONAL CREDIT UNION ADMINISTRATION

FRANK W. HUNGER
Assistant Attorney General

JOHN M. ROBERTS
United States Attorney

DOUGLAS N. LETTER
(202) 514-3602
JACOB M. LEWIS
(202) 514-5090
Attorneys, Appellate Staff
Civil Division, Room 3617
U.S. Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530

OF COUNSEL:

STEVEN W. WIDERMANN
Office of General Counsel
National Credit Union
Administration
1775 Duke Street
Arlington, VA 22314

TABLE OF CONTENTS

| | <u>Page</u> |
|------------------------|-------------|
| BACKGROUND..... | 1 |
| ARGUMENT..... | 4 |
| CONCLUSION | 10 |
| CERTIFICATE OF SERVICE | |

TABLE OF AUTHORITIES

| | <u>Page</u> |
|---|---------------|
| <u>Cases:</u> | |
| Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984)..... | 2,10 |
| Community First Bank v. NCUA, 41 F.3d 1050 (6th Cir. 1994)..... | 9,10 |
| First National Bank & Trust Co. v. NCUA, 90 F.3d 525 (D.C. Cir. 1996)..... | <u>passim</u> |
| <u>Statutes:</u> | |
| 12 U.S.C. 1759 | <u>passim</u> |
| <u>Legislative Materials:</u> | |
| S. Rep. No. 555, 73d Cong., 2d Sess. (1934) | 9 |
| <u>Credit Unions</u> : Hearing before a Subcomm. of the S. Comm. on Banking and Currency, 73d Cong., 1st Sess. (1933) | 9 |
| <u>Administrative Materials:</u> | |
| Interpretive Ruling and Policy Statement 94-1, 59 Fed. Reg. 29066, 29078 (1994) | 7 |
| Interpretive Ruling and Policy Statement 89-1, 54 Fed. Reg. 31168 (1989) | 7 |
| <u>Miscellaneous:</u> | |
| Oxford English Dictionary (1933)..... | 6 |
| Webster's New International Dictionary (1927) | 3 |
| Webster's New International Dictionary (1917)..... | 6 |

Pursuant to this Court's August 27 order, appellee National Credit Union Administration ("NCUA") submits this supplemental brief to address the decision in First National Bank & Trust Co. v. NCUA, 90 F.3d 525 (D.C. Cir. 1996).

In First Nat'l Bank, a panel of the D.C. Circuit overturned the NCUA's policy permitting multiple employee groups to join federally-chartered credit unions. The panel concluded that the governing statute requires that all members of a federal credit union must share the same common bond. As shown below, the statute compels no such conclusion, and the panel should have deferred to the agency's policy under well-settled principles of administrative law.

BACKGROUND

1. This is a suit by a Tennessee bank, joined by the Tennessee Bankers Association, challenging the NCUA's implementation of its "select group" policy to permit Tennessee-based AEDC Federal Credit Union to add a number of additional employee groups to its field of membership. The bank and its state trade association contend that the NCUA's policy violates the common bond requirement of the Federal Credit Union Act ("FCUA"), which provides that "Federal credit union membership shall be limited to groups having a common bond of occupation or association, or groups within a well-defined neighborhood, community, or rural district." 12 U.S.C. 1759. On cross-motions for summary judgment, the district court (Wiseman, J.) upheld that agency's interpretation, finding that the statute was ambiguous and the agency's policy "was entirely consistent with * * * congressional

goals of promoting the continued growth and stability of credit unions." First City Bank. v. NCUA, 897 F. Supp. 1042, 1043-46 (M.D. Tenn. 1995), R. 105, at 3-8.

2. The First Nat'l Bank decision involves a similar challenge by several North Carolina banks, joined by the American Bankers Association, to various approvals issued by the NCUA in 1989 and 1990 allowing North Carolina-based AT&T Family Federal Credit Union ("ATTF") to add a number of additional employee groups to its field of membership. As in this case, the district court upheld the NCUA's policy "as a reasonable interpretation of an ambiguous statute." 863 F. Supp. 9, 14 (D.D.C. 1994). However, a panel of the D.C. Circuit reversed, concluding that Congress's intent to limit federal credit union membership to groups that are bound by a single common bond was "clearly discernible from the statutory text and the purpose of the statute." 90 F.3d at 527.

The D.C. Circuit panel first acknowledged that its review of the NCUA's interpretation of the FCUA was governed by the "familiar rubric" of the Supreme Court's decision in Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-43 (1984), under which, "if * * * the statute is silent or ambiguous on the question at issue, * * * the court will defer to the agency's interpretation if it is permissible in light of the structure and purpose of the statute." Ibid. The panel next rejected as "unconvincing" plaintiffs' contention that the

statute's requirement that credit union membership groups have "a common bond" provided conclusive evidence of Congress's intent to limit the membership of a single credit union to one common bond.

90 F.3d at 528. As it noted, "[t]he article 'a' could just as easily mean one bond for each group as one bond for all groups in an FCU." Ibid.

The panel nonetheless found that the statute's use of the word "groups," even though in plural form, supported the conclusion that Congress intended that all members of a federal credit union share a single common bond. Relying on a dictionary definition of the word "group" as an "assemblage . . . having some resemblance or common characteristic," id. at 528 (quoting Webster's New Int'l Dictionary 955 (1927)), the panel found that "a common bond is implicit in the term 'group.'" Ibid. The panel therefore concluded that "the term 'common bond' would be surplusage if it applied only to the members of each constituent group and not across all groups of members in an FCU." Ibid.

The panel also pointed to the provision in the same section governing "community credit unions" -- membership in which is limited to "groups within a well-defined neighborhood, community, or rural district" -- to support its interpretation. Id. at 529.

Acknowledging that the occupational and community credit union provisions do not use the same terms, the panel nonetheless concluded that because the statute "does not allow multiple groups, each within a different neighborhood, to form a single community

FCU," the statute cannot "allow multiple groups, each drawn from a different occupation * * * to form an occupational FCU." Ibid.

Lastly, the panel examined the purpose of the statute. The panel found that "Congress intended that each FCU be a cohesive association in which the members are known by the officers and by each other in order to 'ensure both that those making lending decisions would know more about applicants and that borrowers would be more reluctant to default.'" Id. at 529-30 (citation omitted). The panel concluded that "the NCUA's reading, which permits multiple unrelated groups to form an occupational FCU, frustrates that purpose." Id. at 530. The panel therefore held that "all members of an FCU must share a common bond," and "[i]f there are multiple occupational groups within a single credit union, then it is not sufficient that the members of each different group have a bond common to that group only." Id. at 530. The Solicitor General is currently considering whether to authorize the government to ask the D.C. Circuit to rehear the First Nat'l Bank decision. Such a request would be due September 13.

ARGUMENT

The panel in First Nat'l Bank erred in concluding that the NCUA's multiple employee group policy violates the common bond requirement. As the district court recognized in this case, by limiting federal credit union membership to "groups having a common bond of occupation or association," 12 U.S.C. 1759 (emphasis added), the FCUA allows for the possibility that membership

in a single federal credit union may consist of more than one employee group. At worst -- as the panel appeared at first to recognize -- the statute is ambiguous: "the plural noun 'groups' could refer * * * to multiple groups in a single FCU," or "to each of the groups that forms a credit union." 90 F.3d at 528.

The panel nonetheless overturned the agency's construction by concluding that, despite the apparent imprecision of the statutory language, Congress's intent to require that all members of a federal credit union share a common bond is "clearly discernible" from the statute's text and purpose. Ibid. As shown below, the panel's analysis is irretrievably flawed.

1. The panel concluded that the term "common bond" as used in the FCUA would be rendered "surplusage" by the agency's construction. See 90 F.3d at 528. It did so because it concluded that the common characteristics that define a "group" under the statute are the same as the unifying relationship between individuals embraced in the statutory term "common bond." Ibid. Under the NCUA's interpretation, however, the requirement that members have a "common bond" is in addition to their being part of a "group." Thus, to join an occupational credit union, persons must show not just that they are members of a group with a loosely defined common occupational characteristic, but that they are connected with one another in a relationship sufficiently substantial to qualify as a "common bond." The agency's inter-

pretation thus gives meaning both to the term "group" as well as the term "common bond," and renders neither redundant.

The panel equated the FCUA's use of the term "group" and the term "common bond" by relying on a dictionary definition of a group as "an assemblage . . . having some resemblance or common characteristic." See 90 F.3d at 528. On the basis of this definition, the panel concluded that "a common bond is implicit in the term 'group.'" Ibid. But the common characteristic that defines a group can be tenuous or trivial. As the dictionary relied upon by the panel states -- in a definition for the word "group" that it did not quote -- a "group" can mean "an assemblage of persons or things" that are "regarded as a unit" simply "because of their comparative segregation from others." Webster's New Int'l Dictionary 955 (definition 3). Thus, a group can simply mean "a cluster," or an "aggregation." Ibid. By contrast, a "bond" connotes a more substantial connection between individuals -- a "uniting" or "cementing" force. See Oxford English Dictionary 981 (1933), accord Webster's New Int'l Dictionary 251 (1917) (a "bond" is "a binding force or influence," or "a uniting tie.").

Thus, it is perfectly appropriate to speak of a "group" of persons with brown hair, or with June birthdays. But such traits, although held by a number of persons, do not easily satisfy the more substantial unifying relationship suggested by the term "common bond." Similarly, one can imagine occupational

groups composed of all those with jobs requiring them to be at work from 9:00 a.m. to 5:00 p.m., or all those employed within the Cincinnati city limits. One would not thereby be required, however, to conclude that the members of those groups were cemented by a common bond of occupation. In short, because a group can as easily be an unruly mob with highly disparate goals as an organization united by common concerns, a group is not necessarily united by a common bond.¹

The panel's erroneous conclusion that the agency's reading of the statute renders the term "common bond" superfluous formed the linchpin of its analysis. The importance of that error wholly dissipates the persuasive force of its opinion.

2. Moreover, the panel's construction neglects other aspects of the statute's language. For example, if "a common bond is implicit in the term 'group,'" and all members "must share a common bond," 90 F.3d at 531, then all members of a federal credit union ultimately must be members of a single encompassing group. But the FCUA limits federal credit union membership to "groups having a common bond of occupation." 12 U.S.C. 1759 (emphasis added). The panel suggested that "the plural noun

¹The NCUA's regulations expressly recognize the difference between the characteristics that may define a group, and those that satisfy the Federal Credit Union Act's common bond requirement. Thus, a federal credit may not apply to represent "[p]ersons employed or working in Chicago, Illinois," or "[p]ersons working in the entertainment industry in California," because such occupational groups are insufficiently defined. See IRPS 94-1, 59 Fed. Reg. at 29076; IRPS 89-1, 54 Fed. Reg. at 31169.

'groups' could refer not to multiple groups in a single FCU but to each of the groups that forms a credit union." 90 F.3d at 528. Even if that were the case, the statute equally allows for the possibility that more than one group can join a single federal credit union, as the district court held here.

In addition, the panel concluded that all members of a federal credit union must "share" a common bond. But, notably, the word "share," which connotes a degree of mutuality, does not appear in the relevant statutory phrase. Instead, the statute provides that membership groups "hav[e]" a common bond, which does not have the same connotation.

3. The fact that the statute limits community federal credit union membership to "groups within a well-defined neighborhood, community, or rural district," 12 U.S.C. 1759, does not support the panel's reading of the statute. It is undisputed that the NCUA interprets this provision to restrict a community federal credit union's field of membership to a single geographic area. But the agency does so because the statute requires that a community-based federal credit union serve groups "within" a well-defined locale, not because the word "groups" means something different in the occupational common bond requirement than in the community field of membership provision. 90 F.3d at 529.

4. Finally, the agency's policy does not frustrate the statute's purpose. See 90 F.3d at 529. To be sure, the greater the number of different employees that are included in a federal

credit union's field of membership, the less likely that the credit union's loan officers will be able to gauge personally the creditworthiness of individual borrowers solely on "character," or that borrowers would be deterred from defaulting because of personal opprobrium or shame. See id. at 529-30. But the FCUA places no limit on the size of a federal credit union, and Congress was aware when it passed the statute in 1934 that some state credit unions had grown sufficiently large that personal knowledge of every borrower's character was impossible. See Credit Unions: Hearing before a Subcomm. of the S. Comm. on Banking and Currency, 73d Cong., 1st Sess. 15 (1933) (statement of Roy F. Bergengren) (noting that Boston's Telephone Workers Credit Union had 16,000 members). Modern technology and the widespread availability of credit information have further lessened the necessity for lending officials to be personally acquainted with a potential borrower in order to evaluate the borrower's creditworthiness or the likelihood that a specific loan will fall into default.

Moreover, Congress sought to advance other goals in the FCUA. As this Court has recognized, Congress wanted to "promote the growth of credit unions" and "enhance credit union stability." Community First Bank v. NCUA, 41 F.3d 1050, 1054 (6th Cir. 1994). The NCUA's policy promotes the safety and soundness of federal credit unions by ensuring that a single credit union will not be unduly dependent upon the fortunes of a particular company

or industry. See NCUA Br. at 32-33. Congress also wanted to promote a "form of credit organization capable of reaching the masses of the people." S. Rep. No. 555, 73d Cong., 2d Sess. 3 (1934). The NCUA's multiple employee group policy directly advances that goal as well, by permitting employees of small businesses to gain access to credit union services even though they might not have enough potential members to establish a viable stand-alone institution. See NCUA Br. at 33-34. The panel's decision thwarts these weighty statutory concerns.

5. In the end, even if the panel's reading is a possible construction of the FCUA, it is not the only interpretation of the statute. And it is the agency, not the courts, to which Congress has entrusted the administration of the FCUA. Chevron, 467 U.S. at 843 n.11 (1984); Community First Bank, 41 F.3d at 1055. In this case, the agency's interpretation is permitted by the language and structure of the FCUA, and broadly promotes the statute's underlying purposes. It should therefore be upheld.

CONCLUSION

For the foregoing reasons, as well as those stated in our principal brief, the district court's decision granting summary judgment for defendants and upholding the NCUA's select group policy should be affirmed.

Respectfully submitted,

FRANK W. HUNGER
Assistant Attorney General

JOHN M. ROBERTS
United States Attorney

DOUGLAS N. LETTER
(202) 514-3602
JACOB M. LEWIS
(202) 514-5090
Attorneys, Appellate Staff
Civil Division, Room 3617
U.S. Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530

OF COUNSEL:

STEVEN W. WIDERMANN
Office of General Counsel
National Credit Union
Administration
1775 Duke Street
Arlington, VA 22314

SEPTEMBER 1996

CERTIFICATE OF SERVICE

I hereby certify that on this ____ day of September 1996,
I served the foregoing Supplemental Brief for the National Credit
Union Administration upon counsel of record by causing two copies
each to be delivered first class mail, postage prepaid to:

Randal S. Mashburn
Scott D. Carey
Baker, Donelson, Bearman & Caldwell
511 Union Street, Suite 1700
Nashville, Tennessee 37219

Rodney M. Scott
Attorney at Law
Third Floor
201 S. Church Street
Murfreesboro, Tennessee 37130

William M. Leech, Jr.
Michael R. Paslay
Waller, Lansden, Dortch & Davis
511 Union Street, Suite 2100
Nashville, Tennessee 37219

Paul J. Lambert
Teresa Burke
Bingham, Dana & Gould
1550 M Street, N.W., Suite 1200
Washington, D.C. 20005

Brenda S. Furlow
Credit Union National Association, Inc.
5710 Mineral Point Road,
P.O. Box 431
Madison, Wisconsin 53701-0431

JACOB M. LEWIS, Attorney